UNITED STATES
v.
BILL BOUCHER
LINDA JOINER DROHMAN

IBLA 95-112 Decided January 25, 1999

Appeal from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., declaring four lode mining claims and four placer mining claims null and void for lack of discovery of a valuable mineral deposit. Contest No. F-87902.

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

   There is a clear distinction between the quantum of evidence which would be sufficient to justify a prudent individual in the continuation of an active search for a mineral deposit of sufficient quantity and value to warrant development and that evidence which is, itself, adequate to justify the commencement of actual development of a productive mine with a reasonable prospect of success. Only the latter showing is sufficient to warrant a finding that a discovery under the mining laws exists.

2. Mining Claims: Discovery: Geologic Inference

   The law does not permit geologic inference to be substituted for a showing of a valuable mineral deposit within the boundaries of each mining claim in question.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Withdrawn Land

   Where the land embraced by a mining claim has been withdrawn from location and entry under the mining laws, the evidence must show that a discovery existed both at the time of the withdrawal and at the time of the contest hearing.

APPEARANCES: Barry Donnellan, Esq., Fairbanks, Alaska, for Appellants; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Bill Boucher and Linda Joiner Drohman have appealed the September 26, 1994, decision of District Chief Administrative Law Judge John R. Rampton, Jr., declaring four lode mining claims and four placer mining claims null and void for lack of discovery of a valuable mineral deposit.

The placer claims were identified in the contest complaint as Discovery at Mouth of Joiner Creek (F-55338), No. 1 above Discovery (F-55339), No. 2 above Discovery (F-55340), No. 3 above Discovery (F-55341), and West Fraction of Discovery at Mouth of Joiner Creek (F-57847). The lode claims were identified as the No. 4 above Discovery Claim (F-55342), No. 5 above Discovery Claim (F-55343), No. 6 anove (sic) Discovery Claim (F-55344) and No. 6-A-above Discovery Claim (F-55345). Although these nine claims are listed in the contest complaint, one of the placer claims, West Fraction of Discovery at Mouth of Joiner Creek (F-57847), is not a legitimate claim, but rather is a subpart of placer claim Discovery at Mouth of Joiner Creek (F-55338). Therefore, only eight claims are at issue in this appeal.

The claims were located by either E. B. Joiner or his daughter, Linda Joiner, in August and September 1946. Bill Boucher acquired his interest in the West Fraction of Discovery at Mouth of Joiner Creek (F-57847) in 1978. (Tr. 191; Ex. G-12 at 4-5.) After a series of conveyances, Joiner quitclaimed his rights and interests in the claims to Boucher in 1985. (Ex. G-12 at 4-5.) The claims are located in secs. 22, 23, 26, 27, and 34 of T. 27 N., R. 13 E., Kateel River Meridian, Alaska, within the Noatak/Kobuk Mining District, Gates of the Arctic National Park and Preserve. The land encompassed by the eight claims was withdrawn from mineral entry on March 15, 1972, by Public Land Order No. 5179. 37 Fed. Reg. 5579-80 (Mar. 16, 1972); Ex. 1. On December 2, 1980, the Gates of the Arctic National Park and Preserve, which includes the contested lands, was created by section 201(4) of the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371, 2377-78.

On October 22, 1991, the Bureau of Land Management (BLM) issued contest complaint F-87902 on behalf of the National Park Service (NPS), charging that:

> a. There are not presently disclosed within the boundaries of the claims minerals of a variety subject to the mining laws sufficient in quantity and quality to constitute a valid discovery, and none were disclosed on March 15, 1972, when the lands were withdrawn from mineral entry.
>
> b. The lands embraced by the claims do not contain a discovery point.

On November 18, 1991, contestees filed an answer in which they denied the charges in the complaint. They also asserted that they have held the claims since 1946, before the withdrawal, and that they should have "grandfather rights" to continue to hold them. They alleged that they have spent considerable money in the performance of assessment work and exploration. Contestees explained that the claims are remote and that they were waiting for the advance of technology and transportation to allow for easier access.

A hearing was held before Judge Rampton on February 9 and 10, 1994, in Fairbanks, Alaska. Based upon the evidence presented by the Government's expert witnesses at the hearing, the Judge concluded that the Government had established a prima facie case that the claims were invalid for lack of discovery of a valuable mineral deposit either at the time of withdrawal or the time of hearing. (Decision at 5, 7.) He found that the contestees did not meet their burden of showing by a preponderance of the evidence that there was a discovery of valuable minerals on the claims. The Judge stated that although contestees did present some evidence of mineralization, none of it could be tied to any pre-withdrawal discovery points. He explained that even if they could have tied their evidence to pre-withdrawal discovery points, their best evidence of mineralization found in six samples taken from the lode claims in 1993 did not show a discovery of a valuable mineral. (Decision at 7.) He also found that the evidence of mineralization was "as weak or weaker for the placer claims." (Decision at 8.) Therefore, he concluded that the contested claims were null and void for lack of discovery of a valuable mineral deposit. (Decision at 8.)

On appeal, as in their post-hearing brief, Appellants assert that the Government is attempting to deprive them of their rightful claims by using a burdensome definition of discovery rather than the simple definition of what constitutes a valuable mineral deposit enunciated in Castle v. Womble, 19 L.D. 455 (1894).

In support of their contention that they have made a discovery, Appellants refer to map folio MR-83 (Ex. MC-9), Edward Cobb, United States Geological Survey (USGS), and Bureau of Mines file 103-78. Appellants assert that these materials "show and identify 'Joiner' Creek as 'having contributed to placer gold production in Alaska between 1880 and 1979.'" (Brief of Appellants at 4.)

Appellants point out that according to USGS file MF-1176-F, 1981 (Ex. MC-6), "Joiner" or "Nigikpalugururuvak" Creek was shown as an active mine and producing a few ounces of gold each year. Appellants note that the file states that the information was obtained from an unpublished U.S. Bureau of Mines report. Appellants believe that these official records of actual production demonstrate the validity of their claims. Appellants assert that the Government's mineral report failed to consider Department of the Interior mineral production reports. Id. at 4-5.

Appellants contend that NPS denied them adequate access to the claims thereby preventing them from gathering data necessary to prove that NPS

erred in their mineral evaluation report. Appellants believe that an unbiased mineral report would substantiate their assertion that the NPS report was based on misleading documentation and data that was not in agreement with other published Department of the Interior information. Id. at 5.

In its Answer, BLM asserts that the Appellants' brief does not contain any new legal or factual arguments. Therefore, as its Answer, BLM incorporates its previously filed post-hearing brief. In that brief, BLM stated that there is no evidence that any of the contested claims contain minerals in a variety subject to the mining laws sufficient in quality and quantity to constitute a valid discovery. BLM asserts that this was true on March 15, 1972, when the land was withdrawn from mineral entry and remains true at the present time. BLM also contends that the evidence presented at the hearing proves that none of the contested claims contain a discovery point. BLM concludes that all of the contested claims must be declared null and void.

Appellants filed a reply brief in which they reiterated that BLM has applied an incorrect definition of "discovery." Appellants cite state court decisions to support their contention, and insist that they have made a discovery as defined by these decisions.

We have thoroughly reviewed the record in this case and the arguments advanced by the Appellants and BLM. Judge Rampton's decision set forth a complete summary of the testimony and other relevant evidence and discussed the applicable law. 1/ We agree with Judge Rampton's findings and conclusions and adopt his decision. A copy of his decision is attached. We add only the following.

Appellants are either misconstruing Federal law or applying state court decisions which are inapplicable. The correct definition of discovery and interpretation of that definition are set forth in Judge Rampton's

---

1/ In one instance, however, the decision below did not correctly state the applicable law. Judge Rampton stated: "Once the government makes its prima facie case, the mining claimant has the burden of proving by a preponderance of the evidence that the contested claims are valid." (Decision at 7.) As the Board pointed out in United States v. Niece, 77 IBLA 205 (1983), this is not true. The Board stated:

"If the Government presents evidence to establish that inefficient [sic] mineralization is present, a prima facie case of no discovery of a valuable mineral deposit has been presented. A claimant then has the burden of overcoming this showing by a preponderance of the evidence. While this may require, in any given case, that the claimant establish the existence of a discovery, it does not require him to prove the validity of the claim, of which discovery is but one element. See United States v. Hooker, 48 IBLA 22 (1980); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975)."

Id. at 206-7, n.2. The Board concluded, however, that the Judge's decision in Niece clearly established the failure of Appellants to preponderate on any relevant issue. The same is true in this case.

decision. The duty to determine the validity of mining claims under the general mining laws is clearly committed to the Department of the Interior. See David J. Bartoli, 123 IBLA 27, 35-36, 99 I.D. 55, 59 (1992), citing Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-38 (1963) and Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976). Federal court decisions, decisions of this Board, and other Department of the Interior decisions constitute the body of case law having precedential value in adjudicating appeals concerning the mining law of 1872. This Board is not bound by state court decisions interpreting that law.

[1] In determining whether a discovery of a valuable mineral deposit has been made, there is a distinction between the quantum of evidence which would be sufficient to justify a prudent individual in the continuation of an active search for a mineral deposit of sufficient quantity and value to warrant development and that evidence which is, itself, adequate to justify the commencement of actual development of a productive mine with a reasonable prospect of success. Only the latter showing is sufficient to warrant a finding that a discovery under the mining laws exists. See generally Converse v. Udall, 399 F.2d 616, 620-21 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); Multiple Use, Inc. v. Morton, 353 F. Supp. 184, 193 (D. Ariz. 1972), aff'd, 504 F.2d 448 (9th Cir. 1974); United States v. Knoblock, 131 IBLA 48, 80-81, 101 I.D. 123, 140 (1994); United States v. Feezor, 130 IBLA 146, 208-10 (1994); United States v. White, 118 IBLA 266, 319-21, 98 I.D. 129, 157-58 (1991).

Testimony at the hearing definitely indicates that this mining operation was, at best, in the exploratory stage. Appellants' expert witness, Ronald Brooks, consulting geologist and geological engineer, testified that he observed mineralization on the lode claims that he thought extended to all four claims. (Tr. 239.) He said this was not "ore," but that it would cause him to "follow up" and "to go look there." (Tr. 239, 241.) Brooks believed that the four lode claims had the potential for large tonnage of mineralization but admitted that the grade of mineralization would have to be high, "and this is a hypothetical situation." (Tr. 244-45.) In regard to the lode claims, Brooks stated that the next logical step would be "systematic exploration" of the claims (Tr. 334.) Testifying about a sample taken from one of the placer claims, Brooks stated that the assays showed mineral anomalies that would lead him to recommend further sampling and testing. (Tr. 265.) According to Brooks, the next logical step in evaluating the five placer claims would be "a systematic sampling program" in order to "study whether or not the claims are economically mineable." (Tr. 333.)

Boucher testified that there had been very little serious mining operations on these claims because Joiner had other interests. Boucher explained that he and Joiner intended to mine these claims in their retirement. (Tr. 194.) Boucher stated that he does not have the faintest idea of where to look for samples and has not arrived at a point where he would have an idea of what he might have to do to develop the claims and work them at a profit. (Tr. 208-209.) These claims have been held by

Appellants and their predecessor-in-interest for over 50 years in an undeveloped state. If, in fact, these claims were as valuable as Appellants assert, one would assume a greater effort would have been made to develop them. See United States v. Lederer and the Estate of Oletha M. Barr, 144 IBLA 1, 3 (1998). Postponing work on the claims until retirement, or until improved access at some unspecified date makes development more convenient, does not excuse the failure to meet the requirements of the mining laws.

[2] Appellants contend that official Departmental records of actual gold production in the Joiner Creek area establish the validity of their claims. This contention is intrinsically flawed as it relates to the requirements of a discovery. As this Board has noted on numerous occasions, while recourse to geologic inference to establish the quantity and quality of a mineral deposit is permitted, geologic inference cannot be used to establish the existence of a mineral deposit. See, e.g., United States v. White, 118 IBLA at 314-15, 98 I.D. at 154-55; United States v. Feezor, 74 IBLA 56, 71, 90 I.D. 262, 270 (1983), vacated in part on other grounds and remanded, 81 IBLA 94 (1984); United States v. Larsen, 9 IBLA 247, 262 (1973), aff'd, Larsen v. Morton, No. 73-119 Tucson (JAW) (D. Ariz. Sept. 24, 1974).

In United States v. Larsen, we stated:

> While geologic inference may not be relied upon to establish the existence of a mineral deposit, it may be accepted as evidence of the extent of a deposit. That is, where ore has been found, the opinions of experts, based upon knowledge of the geology of the area, the successful development of similar deposits on adjacent mining claims, deductions from established facts--in short, all of the factors which the Department has refused to accept singly or in combination as constituting the equivalent of a discovery--may properly be considered in determining whether ore of the quality found, or of any minable quality, exists in sufficient quantity to justify a prudent man in the expenditure of his means with a reasonable anticipation of developing a valuable mine.

United States v. Larsen, 9 IBLA at 262; cited in United States v. Feezor, 74 IBLA at 72-73, 90 I.D. at 271.

Map folio MR-83 (Ex. MC-9) shows occurrences of placer gold in Alaska. Accompanying the map is a reference list which lists publications providing information about localities where placer gold has been found in Alaska. The references for each occurrence are keyed to the numbered localities on the map. Nigikpalvgururvrak Creek 2/ is listed as a locality where placer gold has been found and U.S. Bureau of Mines Open-File Report 103-78 was given as a reference. This report was not included with Appellants' exhibit. The explanation on the map stated that about 21,017,000

2/ We note that Nigikpalvgururvrak Creek has more than one spelling.

fine ounces of placer gold were produced from Alaska between 1880 and 1979, and that approximately two-thirds of this total came from Seward Peninsula and the area near Fairbanks.

The introduction to Map File 1176-F (Ex. MC-6) states that it is one of a series of reports that provides an estimate of the mineral resources of the Survey Pass quadrangle, Alaska, which includes Appellants' claims. A brief description of the Nigikpalugururuvak Creek mining activity states "[c]urrent (1976) placer gold production of a few tens of ounces per year. * * * No record of mining prior to 1970's."

Appellants offered the literature not to show evidence of the extent of deposits within the boundaries of their claims but to prove discovery. If Appellants seek to raise a geologic inference by offering these reference materials, then their offer lacks sufficient foundation, since the law does not permit such an inference to be substituted for a showing there is a valuable mineral deposit within the boundaries of each claim in question. See United States v. Memmott, 132 IBLA 283, 288 (1995), citing United States v. Hines Gilbert Gold Mines Co., 1 IBLA 296, 298 (1971). While expert testimony using such inferences is admissible in mining contest cases, there must be some showing that it is relevant to the particular claims at issue. Id. Map folio MR-83 and Map File 1176-F contain only general information that is not related to any particular claim at issue. Appellants have failed to show that their case was prejudiced by the fact that the Government's mineral report did not include this production information.

Appellants contend that NPS denied them adequate access to the claims, thereby preventing them from gathering data necessary to prove that NPS erred in their mineral evaluation report. Testimony at the hearing reveals that Boucher had requested that BLM allow him to go on the claims in 1993 to locate sample corners and sample discovery points in preparation for the hearing. (Tr. 78.) In response, the NPS issued a special use permit (Ex. G-13) which permitted the sampling of claims at previous discovery points. Because the land had been withdrawn from mineral entry, the permit specified that "[p]roposed sampling must be limited to sampling or re-sampling discovery points that were available prior to withdrawal of land from mineral entry. Hand sampling only is permitted; no test or core drilling is permitted." (Ex. 13, Stipulation 10.) Drummond testified that he allowed Brooks to sample all sites that he wanted to sample except one which he did not consider to be a sample site. (Tr. 82.) Drummond explained that the 1993 field work, including the sampling, was not meant to be a "full-blown mineral examination." (Tr. 90.)

[3] Where the land embraced by a mining claim has been withdrawn from location and entry under the mining laws, as in the instant case, the evidence must show that a discovery existed both at the time of the withdrawal and at the time of the hearing. Cameron v. United States, 252 U.S. 450, 456 (1920); Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974). United States v. Feezor, 130 IBLA at 190; United States v. Wirz, 89 IBLA 350, 352-53 (1985).

The effect of postwithdrawal restrictions on the making of a discovery was discussed by the Board in United States v. Niece, 77 IBLA 205 (1983), as follows:

> The making of a discovery is a prerequisite to the location of a valid claim. 30 U.S.C. § 23 (1976). While we recognize that it is a common practice to locate a claim during what is more properly considered the prospecting rather than the development stage, such a location, at best, only affords a pedis possessio protection. Where the Government subsequently withdraws the land from mineral entry and location, permission to prospect is thereby revoked and only claims then supported by a discovery are protected from the withdrawal. See R. Gail Tibbetts, 43 IBLA 210, 218-19, 86 I.D. 538, 542-43 (1979). Since appellants must show that a discovery pre-existed the withdrawal, postwithdrawal restrictions are simply not germane.

United States v. Niece, 77 IBLA at 207 (footnote omitted). Judge Rampton properly found that, although there was some evidence of mineralization, none of it could be tied to any prewithdrawal discovery points. (Decision at 8.) This in itself, noted Judge Rampton, is a fatal flaw in the contestees' evidence. Indeed, we have emphasized in similar situations that if the claimants needed time after the date of withdrawal to make a discovery, their claim is, of necessity, invalid. United States v. Montapert, 63 IBLA 35, 40-41 (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed. Judge Rampton's decision in mining claim contest No. F-87902 is adopted.

_____
Will A. Irwin
Administrative Judge

I concur:

_____
James L. Byrnes
Chief Administrative Judge

September 26, 1994

UNITED STATES OF AMERICA,	:	F-87902
	:	
Contestant	:	Involving:
	:	F-55338 Discovery at Mouth of
	:	Joiner Creek,
v.	:	F-55339 Number one above
: Discovery,		
	:	F-55340 No. 2 above Discovery,
BILL BOUCHER, :		F-55341 Number three above
	:	Discovery,
LINDA JOINER DROHMAN,	:	F-57847 West Fraction of
	:	Discovery at Mouth of Joiner
	:	Creek placer mining claims;
	:	F-55342 No. four above Discovery
	:	Claim, F-55343 No. 5 above
	:	Discovery Claim,
Contestees	:	F-55344 No. 6, anove (sic)
	:	Discovery Claim,
	:	F-55345 No. 6-A-above Discovery
	:	Claim lode mining claims
	:	located within the Noatak/Kobuk
	:	Mining District, Gates of the
	:	Arctic National Park and
	:	Preserve in Sections 22, 23,
	:	26, 27, and 34 of T. 27 N.,
	:	R. 13 E., Kateel River
	:	Meridian, Alaska

DECISION

Appearances: Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for contestant;

Barry Donnellan, Esq., Fairbanks, Alaska, for contestees.

Before: District Chief Administrative Law Judge Rampton.

This case was initiated by contestant, acting by and through the Bureau of Land Management (BLM), United States Department of the Interior, which filed a complaint charging the above-captioned placer and lode mining claims are null and void because (1) minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a discovery of a valuable mineral deposit, and (2) the claims contain no discovery point. A hearing in the matter was held on February 9 and 10, 1994, in Anchorage, Alaska.

The parties have filed posthearing briefs in support of their respective positions. Having reviewed and considered all evidence and BLM's brief, and for the reasons set forth below, I conclude that the above-captioned mining claims are void for failure to discover a valuable mineral deposit.

Statement of Facts

The contested claims were located in August and September 1946 by either E. B. Joiner or his daughter, contestee Linda Joiner (Tr. 38; Ex. G-12, at 4-5). Contestee Bill Boucher acquired his interest in the claims in 1978 (Tr. 191, Ex. G-12 at 4-5).

Although nine claims are listed in the contest complaint, one of those claims, F-57847, West Fraction of Discovery at Mouth of Joiner Creek placer mining claim, is not, in fact, a legitimate claim, but rather, is a subpart of F-55338, Discovery at Mouth of Joiner Creek placer claim (Tr. 28-29). Therefore, only eight claims are at issue.

The land encompassed by the eight claims has been withdrawn from mineral entry since March 15, 1972 (Ex. 1). On December 2, 1980, the Gates of the Arctic National Park and Reserve, which includes the contested claims, was created. Pub.L. 96-487, 94 Stat. 2371.

Charles Drummond, a National Park Service geologist with many years of experience in examining mining claims, investigated and/or examined the land encompassed by the claims on four separate occasions (Tr. 8-13, 17-18). Drummond, along with Lynn Griffiths, a BLM supervisory mining engineer with a degree in geological engineering and experience with minerals, first investigated the claims on August 25, 1983 (Tr. 31-32, 143-145). The purpose of the 1983 visit was to determine the nature and scope of the mineral examination to be conducted on the claims, including the location of any discovery points to be sampled (Tr. 31, 144). E. B. Joiner and Boucher were present during this initial investigation and were asked to point out discovery points (Tr. 31-34, 145). No specific discovery points were identified, although Joiner gave a very general description of a purported discovery, stating that an adit was located at the site of a waterfall on lode claim No. 6-A Above (Tr. 34, 145; Ex. G-12 at 8). Furthermore, at no time thereafter did the claimants supply BLM with any information supporting the existence of pre-withdrawal discovery points (Tr. 147, 154-155).

Drummond, Griffiths, and Boucher went to the area of the waterfall on claim No. 6-A Above and carefully inspected the area for any sign of sampling, human activity, or significant mineralization (Tr. 34, 146; Ex. G-12 at 8). They did not find any evidence of a discovery or any past mining activity at the site (Tr. 34, 146; Ex. G-12 at 8). They also visited the Discovery at Mouth of Joiner Creek and No. 1 Above claims and saw no signs of mining activity on any of the claims (Tr. 36, 146). The only mineralization observed by

Drummond or Griffiths was some cubic pyrites and phyllites (Tr. 36-39, 145, 147). Drummond took a pan sample from Joiner Creek where the phyllites were located and the assay results showed no gold in the sample (Tr. 38).

On August 5-12, 1985, Drummond conducted a second examination of the claims and claimants were given the opportunity to participate (Tr. 39-42). All of the lode claims were visually inspected along the stream channel and rock outcrops for veins or evidence of earlier sampling (Ex. G-12 at 8). No signs of previous sampling or significant mineralization were found on any of the lode claims (Id.). Drummond found no evidence of mining tools or equipment (Tr. 44). Drummond observed no evidence of discovery points other than one fairly fresh hole on a placer claim that Drummond assumed had been dug by an expert hired by the claimants (Tr. 44-45). Seeing no other evidence of sampling or human activity, Drummond looked for any trace of mineralization (Tr. 45). He observed some quartz and some staining near the waterfall on claim No. 6-A Above, but no minerals of any volume were identified (Tr. 45).

Drummond took twelve samples in 1985, with at least one sample from each of the claims (Tr. 45; Ex. G-12, Attachment 9). On the placer claims, samples were taken on areas which appeared to be "depositional spots" (Tr. 45). On the lode claims, some pan samples were taken to see if the stream carried any mineral sediments, and a chip sample and grab sample were taken from two small areas of mineralization (Tr. 45, 53-56). All of the samples were taken and handled in an appropriate and professional manner (Tr. 48, 50, 54, 57, 65-66). Assays of the samples revealed no significant mineralization (Tr. 67-68, Ex. 11).

On August 24, 1988, Drummond again visited the claims for a cursory check to see if there had been any mining activity (Tr. 73). Drummond observed no evidence of use of the land by humans (Tr. 74-75).

In 1993, Drummond made a final visit to the claims to observe the sampling of discovery points by contestees' expert, Ron Brooks (Tr. 77-80). Contestees had obtained a special use permit to sample the claims, but were limited to sampling pre-withdrawal discovery points (Tr. 79; Ex. 13). In looking for discovery points to sample, Brooks did not appear to be working from a map or other document showing pre-withdrawal discovery locations (Tr. 80). Instead, Brooks physically located and asked to sample sites that appeared to have been previously disturbed or showed mineralization (Tr. 81-83).

Brooks took several samples, but in Drummond's opinion the sampling was not sufficient to determine the volume of any mineralization found in the samples (Tr. 139). In addition to the samples taken by Brooks, Drummond took four additional samples (Tr. 84, 87). Three of the samples were lode samples which showed no significant mineralization (Tr. 99). The lone placer sample showed gold values possibly within the lower limits for a profitable mine if there was "extremely large tonnage and relatively low stripping ratios" (Tr. 99). Drummond performed some economic analysis of the mineralization and

concluded that the expected cost of mining the claims would far exceed the expected revenue both at the time of the hearing and the time of withdrawal (Tr. 102-107).

In the 1993 examination, Drummond did find some evidence of past activity on the claims, including a shovel, pan, and blasting wire (Tr. 94-95). But there was no evidence linking these items to any activity of contestees or Joiner (Tr. 95).

Based upon their investigations, examinations, and analysis, both Drummond and Griffiths concluded that the claims were invalid for lack of discovery of a valuable mineral deposit either at the time of withdrawal or the time of hearing (Tr. 72-73, 110, 188).

Three witnesses testified on behalf of the contestees. None of these witnesses had any firsthand knowledge of pre-withdrawal discovery points and none could locate any such points (*see, e.g.* Tr. 237-38, 326).

Contestee Bill Boucher and Robert Brooks testified that they found gold on the placer claims, but they gave no evidence to establish the quality or quantity of such gold or the representativeness of any samples they took (Tr. 193-196, 205-208, 212-215). Nor did they associate this gold with any pre-withdrawal discovery points.

Boucher admitted that he had not planned to develop the claims until his retirement in 1990, and that he had no idea what he might have to do to develop the claims (Tr. 203, 209). He further admitted that he would need expert help to assess the claims (Tr. 208). The expert he later hired to examine the claims, Ronald Brooks, admitted that he had no idea of the location of any pre-withdrawal discovery points (Tr. 237). He further testified that "Mr. Boucher has not spent the time on the claims to know where the discovery points were that Mr. Joiner made." (Tr. 326)

At one point, Ronald Brooks did opine that a discovery existed on the claims (Tr. 262 263), and on several occasions testified that the mineralization was anomalous (*see, e.g.*, Tr. 262, 265, 278, 295-296). But his definitions of a "discovery" and "anomalous" or "anomaly" were confusing (Tr. 247, 276-277, 331-332, 341-343). 1/ He apparently used the terms to indicate that an area showed sufficient mineralization to warrant staking the area and performing further exploration (*see id.*).

Other parts of his testimony confirm the accuracy of this interpretation of his use of the terms "discovery, "anomalous," and "anomaly." Brooks conceded that the next logical step for the placer claims would be "a systematic sampling program . . . to properly evaluate those claims." (Tr. 333) This program would serve as a feasibility study to determine

---

1/ Another problem with Brooks' use of the terms "discovery," "animals," and "anomaly" was that he did not indicate whether his opinion pertained to the date of withdrawal or some other point in time.

whether the claims are economically minable (Tr. 333). Similarly, with respect to the lode claims, Brooks stated that the next logical step was "systematic exploration." (Tr. 333-34)

Both Boucher and Ronald Brooks complained that the special use permit issued in 1993 did not allow for sufficient or systematic sampling of the claims (Tr. 201-02, 237, 253). Both of them also questioned the adequacy of the mineral examination conducted by Drummond (Tr. 195-198, 266-286, 308-331).

Discussion

BLM's brief accurately sets forth the governing law, which is set forth below without further attribution. Contestees' brief, often relying on inapplicable state law, sets forth erroneous statements of the law too numerous to mention.

The discovery of a valuable mineral deposit is a prerequisite to a mining claim being found valid. 30 U.S.C. § 22 *et seq.*; *United States v. Burt*, 43 IBLA 363, 366 (1979). Since the land in question is within the boundaries of Gates of the Arctic National Park and Preserve and has been withdrawn from mineral entry since March 15, 1972 (Ex. 1), contestees must prove the existence of a valuable discovery at the date of the withdrawal and at the present time. *Cameron v. United States*, 252 U.S. 450 (1920); *Clear Gravel Enterprises, Inc. v. Keil*, 505 F.2d 180 (9th Cir., 1974); *United States v. Lara*, 67 IBLA 48 (1982); and *United States v. Wichner*, 35 IBLA 240, 243 (1978).

The standard utilized to determine whether a discovery of a valuable mineral deposit has been made is the "prudent man" test. *United States v. Coleman*, 390 U.S. 599 (1968); *Chrisman v. Miller*, 197 U.S. 313 (1905); *Castle v. Womble*, 19 L.D. 455 (1894). Accordingly, there must be found within the limits of the contested mining claims mineral of such quality and quantity as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968) *cert. denied* 393 U.S. 1025 (1960); *Barton v. Morton*, 498 F.2d 288 (9th Cir. 1974), *cert. denied* 419 U.S. 1021 (1974); *Thomas v. Morton*, 408 F.Supp. 1361 (D. Ariz. 1976), *aff'd* 552 F.2d 871 (9th Cir. 1977); and *United States v. Edeline*, 39 IBLA 236, 238 (1979).

I.

Did the contestant establish a prima facie case?

Having brought this contest, the government has the burden to make a prima facie case in support of its allegations that the contested claims are invalid. "The well-established rule is that the Government establishes a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery." *United States v. Dresselhaus*, 81 IBLA 252, 257 (1984); and *Hallenbeck v.*

Kleppe, 590 F.2d 852, 859 (10th Cir. 1979); *United States v. Sette*, 46 IBLA 335 (1980); *United States v. Bechthold*, 25 IBLA 77, 85 (1976).

Based upon this law, there is little doubt that contestant established a prima facie case through the testimony of Drummond and Griffiths. While contestees presented evidence suggesting that Drummond was less than thorough in looking for mineralization and reviewing the relevant historical and geological literature, this evidence may not be considered in determining whether a prima facie case was established. As noted by the Interior Board of Land Appeals (Board) in *United States v. Mavros*, 122 IBLA 297 (1992),

> the existence of a Government prima facie case is based solely on the Government's case-in-chief. If not elicited by the Government in its case-in-chief, the claimants' testimony is not considered when determining whether a prima facie case exists* * *.

Id. at 307 n.10. The cross-examination of Drummond did not expose any of these alleged inadequacies in the mineral examination, and the remaining evidence presented in the Government's case-in-chief does not suggest that the mineral examination was deficient in any significant way.

Even if contestees' evidence were considered in determining whether a prima facie case was established, that evidence does not invalidate the Government's prima facie case. In referencing the purported inadequacies in Drummond's mineral examination, contestees misconstrue the nature of a government mineral examiner's duty. Contestees perceive inadequacies in the paucity of samples taken by Drummond, the failure to sample certain mineralized areas, and the lack of a systematic sampling program. Contestees imply that Drummond had a duty to perform discovery work or to explore beyond the current workings of the claims. In fact, a government mineral examiner has no such duty. *Hallenbeck v. Kleppe, supra; United States v. Timm*, 36 IBLA 316 (1978); *United States v. Mattox*, 36 IBLA 171 (1978); and *United States v. Grigg*, 8 IBLA 331, 343; 79 I.D. 682, 688 (1972). Contestees also imply that Drummond had a duty to sample each claim. A government mineral examiner is not so obligated, but need only sample the exposed mineralization on the claim group. *United States v. Mavros*, 122 IBLA at 307.

Because Drummond was never informed as to the location of any discovery points, the circumstances are similar to the facts of the *Mavros* case. In that case, the mineral examiner conducted his examination without the benefit of the claimants' knowledge as to the location of discovery points. *Id.* at 304. The claimants in *Mavros* argued that no prima facie case had been established because the government mineral examiners failed to sample the discovery points, limited their sampling to 6 of the 30 claims, did not sample visible signs of mineralization, based their valuation on one diluted sample, and overestimated the costs of mining. *Id.* at 122.

The Interior Board of Land Appeals rejected the claimants' arguments as follows:

> When a mineral examiner, who is not accompanied by the claimant, undertakes a systematic reconnaissance of a group of claims, and make a conscientious effort to sample those sites deemed most likely to contain mineralization, the combination of observation and sample results is sufficient to form a proper basis for a professional opinion. The mineral examiner is not required to engaged in a comprehensive sampling program of a group of claims to establish definitively that there is no mineralization within any of them. When all of the assays of the samples taken from the sites deemed most likely to contain mineralization indicate mineral values far too low to justify further investigation, the evidence will establish a prima facie case that no discovery exists within all of the claims examined even though no samples were taken from some of those claims.

Id. at 307 (citations omitted). The Board's analysis applies with equal force in this case.

II.

Did contestees overcome the Government's prima facie case?

Once the government makes its prima facie case, the mining claimant has the burden of proving by a preponderance of the evidence that the contested claims are valid. *United States v. Zweifel*, 508 F.2d 1150, 1157 (10th Cir. 1975); *United States v. Springer*, 491 F.2d 239, 242 (9th Circ. 1974), *cert. denied* 419 U.S. 834 (1974); *Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Circ. 1949); and *United States v. Bechthold*, 25 IBLA at 82. Much of contestees' evidence focused on the purported weaknesses of the Government's prima facie case. However, to prevail, the contestees must present sufficient proof of validity and cannot meet their burden of proof by asserting weaknesses in the Government's prima facie case. *United States v. Rosenberger*, 71 IBLA 195, 201 (1983).

Although contestees did present some evidence of mineralization, none of it could be tied to any pre-withdrawal discovery points. This in itself is a fatal flaw in their evidence.

Even if they could have tied their evidence to pre-withdrawal discovery points, their best evidence of mineralization did not show a discovery of a valuable mineral. Ronald Brooks presented contestees' best evidence on the subject. He took six samples from the lode claims in 1993 (Tr. 247). The average value of the samples was $7.00 to $14.00 per ton (Tr. 247). These values are less than the operating cost of $19.33 per ton estimated by Brooks (*compare* Tr. 107-107; Ex. G-12 at 12) ($29.00 per cubic yard estimated by Brooks = $19.33 per ton, given that one cubic yard weighs approximately 3,000 pounds). Brooks did identify one sample that "ran up to $89 a ton" but conceded that the area from which the sample was taken would have to be further prospected (Tr. 247).

Brooks also testified that he visually observed mineralization on the lode claims that he thought extended to all four lode claims (Tr. 239). He conceded this mineralization was not "ore" (Tr. 239), but gave him cause "to go look there." (Tr. 241) He believed that the four lode claims had the potential for large tonnages of mineralization and could only speculate as to whether the quality of mineralization would be high enough to allow for profitable mining of the potential tonnages (Tr. 244-245). Many of Brooks opinions, including his belief in the potential for large tonnages of mineralization on the lode claims were based upon geological inference from his review of the geological literature.

In sum, there were uneconomic values on the surface, no indication of values at depth, and insufficient information to determine the quantity of mineralization. Not surprisingly, Brooks himself concluded that more exploration was required on the lode claims.

The evidence of mineralization was as weak or weaker for the placer claims, with Brooks similarly concluding that more exploration was required to determine whether the claims were economically minable. Unfortunately for contestees, evidence of mineralization which may be sufficient to justify further exploration of the mining claims is not sufficient to establish the discovery of a valuable mineral. *Barton v. Morton*, 498 F.2d at 290-292; *United States v. Kuretich*, 54 IBLA 124, 130 (1981); *United States v. Edeline*, 39 IBLA at 240-241. Likewise, geological inferences that may warrant further exploration do not prove the existence of a discovery. *United States v. Bechthold*, 25 IBLA at 89-90.

Conclusion

Based upon the foregoing, the above-captioned mining claims are hereby declared null and void for lack of discovery of a valuable mineral deposit.

John R. Rampton, Jr.
District Chief
Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures.)

Distribution
By Certified Mail:

Dennis J. Hopewell
Deputy Regional Solicitor
Office of the Regional Solicitor
U.S. Department of the Interior
4230 University Drive, Suite 300
Anchorage, Alaska 99508-4626

Barry Donnellan, Esq.
Attorney at Law
P.O. Box 73795
Fairbanks, Alaska 99707-3795

By Regular Mail:

National Park Service
Alaska Region Room 107
2525 Gambell Street
Anchorage, Alaska 995023